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Via Electronic Mail

Roger Sherman
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Maritime Communications/Land Mobile (MCLM)*, EB Docket No. 11-71 (File No. EB-09-IH; *"Second Thursday"* Application by MCLM and Choctaw to Assign Four geographic and 59 Site-Based AMTS licenses (FCC File No. 0005552500)

Dear Mr. Sherman:

After more than three years of hearing proceedings, Atlas Pipeline Mid-Continent LLC ("Atlas"), Dixie Electric Membership Corporation, Inc. ("DEMCO"), Enbridge Energy Company, Inc. ("Enbridge"), EnCana Oil & Gas (USA) Inc. ("Encana"), and Jackson County Rural Electric Membership Corporation ("Jackson County REMC") (collectively, the "*CII Companies*"), implore the Commission finally to grant their long-pending assignment applications from MCLM Communications/Land Mobile LLC ("MCLM")[1] either through a grant of the pending MCLM/Choctaw *Second Thursday* Application[2] or by favorable action on the *CII Companies'* still unresolved Petition for Reconsideration[3] of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing ("HDO") in the MCLM proceeding.[4]

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[1] Encana Oil and Gas (USA) Inc. filed its assignment application in November 2009 (**ADD FILE NO**.). Jackson County REMC filed its application on July 6, 2010 (FCC File No. 0004310060). Enbridge filed its application on November 19, 2010 (FCC File No. 0004430505). DEMCO filed its application on December 8, 2010 (FCC File No. 0004507921). Atlas Pipeline filed its application on March 2, 2011 (FCC File No. 0004526264).

[2] FCC File No. 0005552500.

[3] CII Petitioners Petition for Reconsideration, filed May 19, 2011 (EB Docket No. 11-71).

[4] MCLM Communications/Land Mobile, LLC, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (rel. Apr. 19, 2011) ("HDO").

The *CII Companies* – three oil and gas companies and two rural electric cooperatives – individually seek the assignment of spectrum from MCLM for private, internal applications, in furtherance of their provision of safe and efficient energy services to the American public. Few if any other spectrum alternatives are available to satisfy their communications requirements.

Each of *the CII Companies* is included within the definition of a Critical Infrastructure Industry ("CII") company[5] under the Commission's rules. All acted in good faith in dealing with MCLM, and none has been accused of any "wrongdoing" in the Commission's HDO or otherwise. All of their applications request partitioning of small portions of MCLM's geographic licenses; none involve contested "site-based" licenses.

All of the *CII Companies* are justifiably frustrated after years of delay in processing their applications. They urge the Commission to grant their applications at long last either through *Second Thursday* or by favorable action on their Petition for Reconsideration of the HDO in this proceeding.

Background

In 2005, MCLM claimed a "very small" business bidding credit of 35 percent during the auction of Automatic MCLM Telecommunications Service (AMTS) licenses in Auction 61. After a 12-month investigation, the Commission determined that MCLM was entitled only to a 25 percent bidding credit as a small business.[6] The Commission ordered MCLM to pay the difference in the bidding credits, granted MCLM's applications, and issued the area-wide AMTS licenses at issue in this proceeding.

At that time, there were no other adverse rulings against MCLM on the public record nor was any further enforcement action pending against the company. Rather, from all appearances, MCLM had rectified its previous deficiencies regarding the status of its bidding credits and its licenses were free and clear of any encumbrances.

MCLM thereafter began marketing its licenses to the energy industry under the Commission's "secondary markets" decision, which authorized licensees to partition and disaggregate their spectrum.[7] Because the public record reflected MCLM's status as an authorized Commission licensee, the *CII Companies* in good faith separately negotiated at arms'

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[5] 47 C.F.R. §90.7.

[6] See, In Re Maritime Communications/Land Mobile LLC, Application for new Automated Maritime Telecommunications System Stations, Order, DA 06-2368 (rel. Nov. 27, 2006).

[7] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20604 (May 15, 2003).

length their respective purchases of spectrum. From November 2009 through March 2011, contracts were finalized and the referenced applications to assign small portions of MCLM's AMTS licenses to the *CII Companies* were duly filed with the Commission.

On April 19, 2011, the Commission released the HDO designating for hearing MCLM's licenses and pending applications, including those involving the *CII Companies*. The primary issue identified for hearing was whether MCLM improperly claimed bidding credits as a small business during AMTS Auction 61 in 2005.

In short, having previously disqualified MCLM as a "very small" business, finding it should have been classified as only a "small business," the Commission switched gears six years later in the HDO and questioned whether MCLM was legitimately entitled even to small business status. Meanwhile, the *CII Companies* and others who entered into spectrum purchase agreements with MCLM in the intervening years based on MCLM's apparently clean slate as a Commission licensee, were left in limbo and have stayed there for the last three years.

MCLM's 12 proposed assignees included four oil and gas companies, seven electric utilities, and one railroad. The HDO permitted only the railroad, the Southern California Regional Rail Authority (SCRRA), to show cause why its application should be "removed from the ambit of the hearing proceeding and granted" due to its pressing need to use this spectrum for Positive Train Control (PTC).

On May 19, 2011, the *CII Companies* filed a Petition for Reconsideration of the HDO supporting the removal of SCRRA from the hearing but challenging why the CII Companies' applications were treated differently from the similarly-situated railroad applicant.

On July 15, 2011, since the Commission failed to timely rule on their Petition for Reconsideration, the *CII Companies* filed a Request for Expedited Action, reiterating their pressing need for this spectrum to support critical infrastructure applications in the energy industry and beseeching the Commission to act promptly and favorably on their request.

In August 2011, MCLM filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of Mississippi. The Bankruptcy Court subsequently approved MCLM's assumption of its individual contracts with the *CII Companies*. Of note, each of the CII Companies was found to be good faith purchasers within the meaning of section 363(m) of the Bankruptcy Code following contested evidentiary hearings.

On June 27, 2012, with still no word from the Commission either in response to their Petition for Reconsideration or their Request for Expedited Action, the *CII Companies* filed a Second Request for Expedited Action.

On November 15, 2012, the Bankruptcy Court approved MCLM's plan of reorganization permitting Choctaw Holdings, LLC ("Choctaw") to acquire the right, title and interest in MCLM's licenses subject to approval by the Commission.

On January 23, 2013, MCLM and Choctaw filed an application to assign four geographic and 59 site-based AMTS licenses from MCLM to Choctaw under the Commission's Second Thursday doctrine ("*Second Thursday*" or "MCLM/Choctaw Application").

On March 28, 2013, the Commission released a Public Notice asking whether the Choctaw Assignment Application and the *CII Companies'* related assignment applications should be granted.[8]

On May 9, 2013, the *CII Companies* filed Comments urging an immediate grant of their Applications either under *Second Thursday* or through the pending, longstanding Petition for Reconsideration.

Comments

1. The Commission Should Grant The Choctaw Application And The CII Companies' Assignment Applications under Second Thursday.

The MCLM/Choctaw Assignment Application may be granted under the Commission's *Second Thursday* doctrine if the alleged wrongdoer(s) will either derive no benefit from grant of the application or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.[9] The Bankruptcy Court approved the assumption of these sale agreements by MCLM as the Debtor-in-Possession to each good faith purchaser and later approved the Plan of Reorganization assigning MCLM's rights and obligations to Choctaw. Consistent with the confirmed plan, Choctaw has committed to honoring the contracts with the *CII Companies*. To protect the contractual rights of the *CII Companies* as established in the Bankruptcy proceeding, the Commission should condition any assignment to Choctaw on the requirement that Choctaw in turn file applications for the assignment of the appropriate partitioned licenses to the *CII Companies*.

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[8] Comment Sought on Application to Assign Licenses Under Second Thursday Doctrine, Request for Waiver and Extension of Construction Deadlines, and Request to Terminate Hearing, Public Notice, DA 13-569, March 28, 2013 (Second Thursday Public Notice).

[9] Second Thursday Corp., Memorandum Opinion and Order, 22 FCC 2d 515 (1970)("Second Thursday MO&O"), recon. granted in part, 25 FCC 2d 112 (1970).

The *CII Companies* urge the Commission to grant their applications via *Second Thursday*. Although the general policy, established in the context of broadcast applications, is that the Commission will not assign a license until issues relating to the underlying authorization are resolved, as the Commission noted in the *Second Thursday* Public Notice that policy is not without exception when the public interest requires assignment to an innocent assignee even during a pending enforcement action against the licensee.

The Commission has found that the weight for allowing free transferability of licenses is even greater with non-broadcast licenses (as exists here) than in the broadcast context:

> In view of these significant differences between broadcast and nonbroadcast services, we believe that no valid purpose would be served here by applying our broadcast policy of prohibiting transfers when there are outstanding character issues to be resolved against the transferor. The facts in this case reveal clearly that no harm to the public will occur by excepting these applications from our normal policy and, that, to the contrary, the public interest will be served by a transfer of these facilities to a qualified applicant …. Thus, we will allow the transfer.[10]

The decision of whether to approve a license transfer "turns upon a balancing of the public interest considerations favoring the free transferability of the licensee's interest against the Commission's long-term interest in deterrence to determine whether, on the whole, the public interest weighs in favor of free transferability."[11] Applying this balancing test, the Choctaw Assignment Application and *CII Companies'* assignment applications should be granted here, where innocent third parties acting in good faith otherwise will be irreparably harmed. The Commission has found that deferring "actions on all of the licenses held by a multiple licensee pending a final resolution of character issues raised by alleged misconduct may operate to the detriment of the public interest."[12] That is precisely the case here.

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[10] Applications of Cablecom-General, Inc., 87 FCC2d 784, 790-791 (1981). (Allowing a transfer of control involving applications in several non-broadcast services including the Cable Television Relay Service (CARS); point-to-point common carrier microwave radio service; and the satellite communications service).

[11] Applying this balancing test in allowing the transfer of a cellular license interest, the Commission concluded, "we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems." Id., at ¶10

[12] Cellular System One of Tulsa, Memorandum Opinion and Order, 102 FCC 2d 86, at ¶8 (1985). "An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Otis L. Hale d/b/a Mobilfone Communications, Order to Show Cause and

(continued …)

This spectrum is urgently needed by electric utilities and oil and gas companies pursuant to federal mandate for use in emergencies and for other critical applications involving the protection of life and property. While the benefit to the individual *CII Companies* and the public at large in their respective service areas will be great, the total amount of spectrum to be assigned to the *CII Companies* is but a fragment of MCLM's larger geographic and site-specific licenses.

In its *Second Thursday* Showing, Choctaw represents that the alleged bad actors (the DePriests) have no role in Choctaw and will play no future role with respect to any of the licenses subject to the instant application nor will they derive any benefit from the sale of the licenses. With that in mind, the *CII Companies'* long pending assignment applications finally should be granted.

2. Alternatively, the Commission Should Grant the CII Companies' Applications Through Favorable Action on their Longstanding Petition for Reconsideration.

Among all of MCLM's proposed assignees (there originally were twelve: four oil and gas companies, seven electric utilities, and one railroad), the HDO permitted only SCRRA to show cause why its application should be "removed from the ambit of the hearing proceeding and granted" due to its pressing need to use this spectrum for Positive Train Control (PTC).

The Commission afforded SCRRA an opportunity to extract itself from the hearing because its purchase of AMTS spectrum was deemed necessary to comply with a federal mandate for PTC. On May 19, 2011, the *CII Companies* filed a Petition for Reconsideration of the HDO supporting the removal of SCRRA from the hearing but challenging why the *CII Companies'* applications should be treated differently from the similarly-situated railroad applicant. The *CII Companies* pointed out that their requirements for this spectrum were as great as the railroad's, and they, too, should be removed from the hearing.

Like the railroad, the *CII Companies* are defined as "Critical Infrastructure" under the Commission's rules. Like the railroad, the *CII Companies* require the use of this spectrum to comply with federal mandates. Like the railroad, the *CII Companies* need these frequencies to support critical and innovative new applications in the public interest, such as smart grids, advanced pipeline automation and electric distribution control. Like the railroad, the Commission has made available no other suitable spectrum to satisfy the *CII Companies'* pressing communications requirements. And, like the railroad, the *CII Companies* acted in good

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(…continued)
Memorandum Opinion and Order Designating Applications for Hearing, 1985 FCC LEXIS 2389, at ¶13 ("Mobilfone") citing Haney v. Chaney, 470 US 821, 831 (1985).

faith in their dealings with MCLM, as specifically held by the bankruptcy court, and are not alleged in the HDO to have done anything "wrong."

The *CII Companies* argued in their Petition for Reconsideration that nothing in the Commission's rules nor prior decisions provided a legitimate basis for the Commission to distinguish among critical infrastructure companies or to elevate a railroad above similarly-situated electric utilities and oil and gas companies in terms of the public interest, convenience, and necessity.

The *CII Companies* sought AMTS spectrum from MCLM to comply with federal law and for reliability and public safety reasons, much like SCRRA. It is an unlawful abuse of discretion for the Commission to extract a railroad from the hearing proceeding while not affording the same opportunity to electric utilities and oil and gas companies facing similar federal requirements and spectrum shortages.

On July 15, 2011, the *CII Companies'* filed a Request for Expedited Action on their still pending Petition for Reconsideration, reiterating their pressing need for this spectrum and beseeching the Commission to act promptly and favorably on their request. The *CII Companies* pointed out again that no other suitable spectrum was readily available to satisfy their communications requirements. No response was received from the Commission.

During prehearing conferences, the *CII Companies* repeatedly complained to the Presiding Administrative Law Judge ("ALJ") of the Commission's continuing delay in processing their applications and requested that the ALJ remove the applications from the scope of the hearing proceeding and grant them himself. The ALJ empathized with the *CII Companies'* frustration but determined that "his hands are tied," because he lacks the authority necessary to approve the applications:

> I'm trying to think if there is anything it's possible that I can do, and I'm, honestly, my hands are tied. And I know the frustration. I mean, I can't believe that what I'm hearing here is that you've got such public interests hanging around… I'm frustrated. I don't know what I would do if I were in your situation. I don't know what you should do.[13]

[13] See, Transcript of October 25, 2011, Hearing at p. 266 available at http://apps.fcc.gov/ecfs/document/view?id=7021747027 (last visited May 9, 2013).

Since the ALJ believed that he was not authorized to act, and the Commission still had not ruled on their Petition for Reconsideration or their Request for Expedited Action after almost a full year, the *CII Companies* filed a Second Request for Expedited Action on June 27, 2012, reiterating their critical need for this spectrum to serve the public interest and again beseeching the Commission to act promptly and favorably on their request. Again, no response has been forthcoming from the Commission.

The *Second Thursday* Public Notice noted that although the exception in the HDO was directed solely at the application to assign spectrum to the railroad, the *CII Companies* had filed pleadings arguing that the same public interest considerations supported removal of their applications. As noted in the Public Notice, the *CII Companies* echo that request here as an alternative to relief under *Second Thursday*.

For the reasons outlined above, the CII Companies wholeheartedly urge the Commission to grant their longstanding Petition for Reconsideration, remove their applications from the ambit of hearing, and grant them post haste outside the scope of *Second Thursday* if necessary.

Conclusion

Through no fault of their own, the *CII Companies* – five Critical Infrastructure Companies representing different aspects of the energy industry – have been denied the right to purchase much needed spectrum to satisfy their communications requirements. Although all of the proposed assignees acted in good faith in reliance on the Commission's secondary market decisions and MCLM's public status as a full-fledged, authorized Commission licensee, their applications have been held hostage to the Commission's enforcement action against MCLM for years. Continued delay in processing the *CII Companies'* applications is unwarranted and detrimental to the public interest.

The Commission should remove all of the *CII Companies'* applications from the hearing and promptly grant them in the public interest either via *Second Thursday* or through favorable action on their longstanding Petition for Reconsideration of the HDO. Grant of the *CII Companies'* applications will provide critical infrastructure entities with spectrum urgently needed to serve the nation's citizens with core energy services especially in times of emergency and other events affecting the safety of life and property.

Respectfully submitted,

Atlas Pipeline Mid-Continent LLC,
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Enbridge Energy Company, Inc.,
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Certificate of Service List (Attached)

CERTIFICATE OF SERVICE

I, Justine D. Bedard, hereby certify that on this 8th day of May, 2014, a copy of the foregoing Letter was filed with the Commission, served on the parties listed below via First Class U.S. Mail and a courtesy copy was provided via electronic mail.

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